FILED
AUG 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-150

In the Supreme Court of the United States

OCTOBER TERM, 1982

RETAIL CLERKS UNION LOCAL 648,
RETAIL CLERKS UNION 870, AFL-CIO
and
U.F.C.W. LOCAL 1228

Petitioners,

vs.

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
and
EXXON CORPORATION, STANDARD OIL COMPANY OF CALIFORNIA, CHEVRON USA, INC., ATLANTIC RICHFIELD COMPANY, SHELL OIL COMPANY, TEXACO, INC., GULF OIL COMPANY, MOBIL CORPORATION, MOBIL OIL CORPORATION, CONOCO, INC., AND UNION OIL COMPANY OF CALIFORNIA,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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THE QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals abuse its discretion by refusing an extraordinary writ to review an order of the Judicial Panel on Multidistrict Litigation transferring pursuant to 28 U.S.C. § 1407 an antitrust case pending in the District Court for the Northern District of California to the Central District of California for coordinated pretrial proceedings with other cases involving essentially the same real parties in interest and the same claims, in the circumstances that (a) the case had been removed from the California state court, (b) prior to entry of the transfer order a motion to remand had been filed in the Northern District Court, (c) an order of the Northern District Court stayed all proceedings until after the transfer motion had been decided by the Panel, and (d) the motion to remand is now pending before the Central District Court?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Preliminary Statement	2
Statement of the Case	3
Reasons for Denial of the Writ	4
Basis for Federal Jurisdiction	5
Conclusion	6
Appendix A, List of Related Companies Pursuant to Rule 28.1, Revised Rules of the Supreme Court of the United States	A-1

TABLE OF AUTHORITIES

Cases

	Page
BankOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975)..	4
Federated Department Stores v. Moitie, 452 U.S. 394 (1980)	2, 3, 5
Flood v. Kuhn, 407 U.S. 258 (1972)	6
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	3
Singleton v. Wulf, 428 U.S. 106 (1976)	4
Sola Electric Co. v. Jefferson Co., 317 U.S. 173 (1942)	6

Constitutional Provisions

United States Constitution, Supremacy Clause, Article VI, Clause 2	6

Statutes

Title 15, United States Code, Section 1 et seq. (Sherman Act)	2, 5
Title 15, United States Code, Section 12 et seq. (Clayton Act)	2
Title 15, United States Code, Section 15(c) (*parens patriae* statute)	2, 6
Title 28, United States Code, Section 1407	2, 5, 6
Title 28, United States Code, Section 1441(b)	2, 6

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This brief is submitted on behalf of certain of the respondents, defendants below.[1]

1. Those defendants are Standard Oil Company of California, Chevron USA, Inc., Atlantic Richfield Company, Shell Oil Company, Texaco, Inc., Gulf Oil Company, Mobil Corporation, Mobil Oil Corporation and Union Oil Company of California. The list of related companies required by this Court's Rule 28.1 is Appendix A hereto.

PRELIMINARY STATEMENT

We agree with petitioners that there inheres in these proceedings an important jurisdictional question, which ultimately may require resolution by this Court, viz:

> May this Court's interpretations of the federal antitrust laws be circumvented by initiation of an action in state court purportedly stating claims under a state antitrust statute involving parties and transactions in interstate commerce already the subject of multidistrict Sherman Act litigation brought by several state attorneys general pursuant to the federal *parens patriae* statute (15 U.S.C. § 15(c)) and consolidated in federal court for pretrial proceedings pursuant to 28 U.S.C. § 1407, or do not the supremacy of federal law and the federal policies expressed in the Sherman and Clayton Acts, the *parens patriae* statute and 28 U.S.C. § 1407 require the application of federal law to such state court action and is it not therefore removable to federal court pursuant to 28 U.S.C. § 1441(b) as an action arising under federal law? And does not the Court's recent decision in *Federated Department Stores v. Moitie, infra,* provide an adequate basis for removal in these circumstances?

But that question is not yet ripe for review by this Court. An accurate statement of the question now presented is as stated at page (i), *supra.*

STATEMENT OF THE CASE

Petitioners filed this action in the California Superior Court in San Francisco, California, asserting claims purportedly arising under California's antitrust statute, which were already the subject of a case pending between essentially the same real parties in interest and consolidated for pretrial purposes with other similar cases in the United

States District Court for the Central District of California, *Petroleum Products Antitrust Litigation*, MDL 150-WPG, in the files of that court and assigned to the Honorable William P. Gray.[2] Defendants removed this case to the District Court for the Northern District of California on the ground, among others, that the case was artfully pleaded to avoid the jurisdiction of the federal courts and the pretrial rulings in MDL-150, relying on *Federated Department Stores v. Moitie*, 452 U.S. 394, 397, n.2 (1980). Petitioners filed a motion to remand. Defendants filed with the Judicial Panel on Multidistrict Litigation a motion to transfer this case to the Central District of California for consolidation with MDL-150. The Northern District Court stayed its consideration of the motion to remand until after such time as the Panel should decide the motion to transfer. Petitioner filed a petition for writ of mandamus with the Court of Appeals seeking to compel a ruling by the Northern District Court on the motion to remand. The Court of Appeals denied the petition. The Panel thereafter transferred this action to the Central District of California for consolidation with MDL-150.

Petitioners again filed a petition for writ of mandamus with the Court of Appeals seeking review of the transfer

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2. Among the MDL-150 cases is *State of California v. Standard Oil Company of California, et al.*, 76-2839-WPG, in which California seeks recovery under both state and federal antitrust laws on behalf of a class of California motorists that subsumes the class sought to be represented by plaintiffs in the case at Bar against eight of the same defendants. California sought certification of a class of motorists on the grounds, among others, that sales to motorists by defendants' lessee dealers are in fact direct sales by defendants not barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The present action was filed in state court only a few months after Judge Gray declined to certify a motorist class in the *California* action, which order is pending on appeal in the Ninth Circuit Court of Appeals.

order entered by the Panel, which was denied "in light of the alternative remedies available to petitioner" (Petition, Exhibit 2).

REASONS FOR DENIAL OF WRIT

There is no basis for issuance of a writ of certiorari to review the order of the Court of Appeals.

(1) No lower court has yet addressed the jurisdictional question presented by the motion to remand. As the Court of Appeals recognized in denying the petition below, it would be premature for either the Court of Appeals or this Court to address the question. *Singleton v. Wulf*, 428 U.S. 106, 119-21 (1976). The District Court to which the case has been transferred is the appropriate court to address the motion to remand.

(2) The denial of the writ of mandamus does not conflict with the decisions of any other circuits. In *BankOhio Corp. v. Fox*, 516 F.2d 29 (6th Cir. 1975), the Court of Appeals reversed a District Court's denial of a motion to remand, thereby ousting the federal courts of jurisdiction. The Court of Appeals had no occasion to review the action of the Panel, which had *stayed* its transfer order pending the outcome of the mandamus proceeding in the Court of Appeals. In the present case, no court has acted on plaintiffs' motion to remand; the jurisdiction of the federal courts remains; and the petition is addressed solely to the transfer order of the Panel.

(3) The decision of the Court of Appeals does not conflict with any prior decision of this Court.

(4) The petition herein presents merely the issue whether the Court of Appeals abused its discretion in refusing to issue its extraordinary writ to vacate the Panel's transfer order with the end that a pending motion to remand would

be decided by the District Court sitting in San Francisco, rather than Los Angeles. The matter of transfer was well within the statutory authority of the Panel and presents no proper question for consideration by the Court of Appeals or this Court.

(5) The rule of law urged by Petitioners would either foreclose the Panel from transferring a class of cases removed from state courts or would require the Panel to decide substantive questions of removal jurisdiction. The one would derogate powers vested in the Panel by statute, and the other would confer powers not conferred by statute.[3]

BASIS FOR FEDERAL JURISDICTION

Although premature for this Court to decide, the jurisdictional question is an important one. When reached in the District Court, which of course has jurisdiction to decide its jurisdiction, the question is governed, among others, by *Federated Department Stores, Inc. v. Moitie, supra.* The Court there held that an antitrust case purportedly filed under state law is removable if it is essentially a federal claim artfully pleaded to avoid the pre-existing jurisdiction of the federal court with respect to the same parties and claims under the Sherman Act. Here the plaintiffs have sought to avoid the pretrial rulings of MDL-150 by proceeding in state court on an interstate antitrust claim already subject to federal jurisdiction with the hope that the state

3. 28 U.S.C. § 1407 does not authorize the Panel to decide questions of the removal jurisdiction of the federal courts. The Section merely provides for transfer from one district to another "when civil actions involving one or more common questions of fact *are pending in different districts* . . . ." (Emphasis ours.) There is no dispute that this cause was "pending" in the Northern District Court at the time the Panel entered its transfer order, and petitioners conceded before the Panel that there are common questions of fact justifying transfer.

court will ignore the decisions of this Court interpreting the Sherman and Clayton Acts and apply to interstate transactions state law that conflicts with federal law. This would be impermissible under the Supremacy Clause of the Constitution and an undue burden on interstate commerce. *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176 (1942); *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972). Since federal law preempts application of state law, the case arises under federal law and is removable pursuant to 28 U.S.C. § 1441(b). This result is particularly appropriate when class action litigation against an entire interstate industry has been consolidated pursuant to 28 U.S.C. § 1407 and the attorneys general of several states have brought actions on behalf of their citizens under the federal *parens patriae* statute, 15 U.S.C. § 15(c).

CONCLUSION

For the foregoing reasons we respectfully submit that this case is not procedurally ripe for review by this Court; the critical question of jurisdiction is not yet presented to this Court; and, accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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